

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:WR:SCA:LN:TL-N-6420-99
TIRussell

date:

to: Janet Anderson, 90 Day Section, E:PSP:REV

from: District Counsel, Southern California District, Laguna Niguel
T. Ian Russell, Attorney
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subject: ISSUANCE OF A SECOND NOTICE OF DEFICIENCY

The advice requested is whether the Service is barred from re-issuing a previously rescinded, non-petitioned notice of deficiency, when the effective date of rescission was before expiration of the applicable assessment periods, but one day after expiration of the 90-day period for petitioning the Tax Court.

The initial notice of deficiency determined deficiencies for the taxable years [REDACTED] and [REDACTED] in the respective amounts of \$ [REDACTED] and \$ [REDACTED], plus accuracy-related penalties for negligence in the respective amounts of \$ [REDACTED] and \$ [REDACTED]. The notice was rescinded and an audit reconsideration was given, but the taxpayer failed to provide anything to alter the determinations. Exam now would like to re-issue the notice of deficiency.

Following is a complete review of the issue by counsel.

FACTS

The taxpayers timely filed a joint return for the [REDACTED] taxable year on or before April 15, [REDACTED], and for the [REDACTED] taxable year on or before April 15, [REDACTED].

In [REDACTED] of [REDACTED], the taxpayers and a delegate of the Commissioner executed a Form 872, Consent to Extend the Time to Assess Tax, and extended the period of assessment for the [REDACTED] taxable year to December 31, [REDACTED]. The Form 872 listed only the

The taxpayers executed the Form 872 on [REDACTED], and the Commissioner's delegate executed it on [REDACTED].

_____ taxable year.

On _____, the taxpayers were issued a notice of deficiency for the _____ and _____ taxable years.

On _____, the Quality Review Coordinator, 90 Day Section, issued a letter to the taxpayers representative. The letter stated as follows:

This letter is in response to your recent inquiry regarding the statutory notice of deficiency issued _____.

In accordance with your request, we have agreed to rescind the notice of deficiency which was issued _____. The agreement forms are enclosed [(specifically, a Form 872 and a Form 8626, Agreement to Rescind Notice of Deficiency)]. Please sign both copies and return them to us by _____. After we receive the agreement, we will execute it and return a copy to you for your records. We then will send your case back to the examination group.

If we do not receive the agreement by that date, we will assume that you have changed your mind, and plan to petition Tax Court. The last day for filing a petition is _____.
_____.

On _____ (a Thursday), the taxpayers' representative faxed to the 90 Day Section copies of the Form 872 and Form 8626. Both forms were executed by the taxpayers and their representative, and dated _____. The Form 872 listed the taxable years _____ and _____ and extended both of the respective limitations periods to _____.

The Internal Revenue Service received the original signed Forms 872 and 8626 by mail on _____. A delegate of the Commissioner signed both of the forms on _____.

On _____, the 90 Day Section mailed copies of the fully executed Forms 872 and 8626 to the taxpayers' representative. The cover letter stated as follows:

This letter is in response to your recent inquiry regarding the statutory notice of deficiency issued _____.

Enclosed are copies of the executed Forms 872 and 8626. In accordance with our agreement, the notice of deficiency was rescinded on _____, the date you and your representative executed the Forms 872 and 8626 (copies of

which were received by fax on [REDACTED].

We are returning your case to the examination group. The group will be contacting you. Please respond promptly when contacted as you will be provided only one opportunity to resolve your case. If you do not hear from the group within 14 days from the receipt of this letter, then please contact the group yourself.

Exam held audit reconsideration appointments with the taxpayers' representative on [REDACTED], [REDACTED], and [REDACTED]. The taxpayers' representative did not present anything to Exam to alter the proposed adjustments. On [REDACTED] Exam returned the case to the 90 Day Section.

ISSUE

Whether the Service is barred from re-issuing a previously rescinded, non-petitioned notice of deficiency, when the effective date of rescission was before expiration of the applicable assessment periods, but one day after expiration of the 90 day period for petitioning the Tax Court.

DISCUSSION

I. Law.

Section 6501(a) provides in part that the amount of any tax shall be assessed within 3 years after the return is filed. For purposes of section 6501, a return filed before the last day prescribed by law shall be considered as filed on such last day. § 6501(b).

Section 6501(c)(4) provides that where, before the expiration of the time for assessment, both the Secretary and the taxpayer consent in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. § 6501(c)(4).

Pursuant to section 5.03 of Revenue Procedure 98-54, 1998-43 I.R.B. 7, the "effective date of the rescission agreement is the date on which the Commissioner's delegate signs Form 8626." In the instant matter, therefore, the effective date of the rescission was [REDACTED].

Treas. Reg. section 301.6501(c)(1)(d) provides in part that a written extension agreement as prescribed by section 6501 "shall become effective when the agreement has been executed by both parties."

Section 6503(a)(1) provides generally that the running of the period of limitations provided in section 6501 on the making of assessments, in respect of any deficiency shall (after the mailing of a notice under section 6212(a)) be suspended for the period during which the Secretary is prohibited from making the assessment or from collecting by levy or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Tax Court, until the decision of the Tax Court becomes final), and for 60 days thereafter.

Section 6212(a) authorizes the Secretary, in the event he determines a deficiency in tax, to send notice of such deficiency to the taxpayer by certified or registered mail. If the taxpayer, in turn, files a timely petition with the Tax Court, the Commissioner is in general precluded from mailing to the taxpayer a second notice of deficiency determining an additional deficiency in income tax for the same year. § 6212(c).

Section 6213(a) provides that within 90 days after the notice of deficiency is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. It provides further that no assessment of a deficiency shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90 day period.

Section 6213(c) provides that if the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency shall be assessed, and shall be paid upon notice and demand from the Secretary.

Section 6212(d) authorizes the Secretary, "with the consent of the taxpayer, to rescind any notice of deficiency mailed to the taxpayer." (Emphasis added). Section 6212(d) provides further that,

Any notice so rescinded shall not be treated as a notice of deficiency for purposes of subsection (c)(1) (relating to further deficiency letters restricted), section 6213(a) (relating to restrictions applicable to deficiencies; petition to Tax Court), and section 6512(a) (relating to limitations in case of petition to Tax Court), and the taxpayer shall have no right to file a petition with the Tax

Court based on such notice. Nothing in this subsection shall affect any suspension of the running of any period of limitations during any period during which the rescinded notice was outstanding. [Emphasis added]

The last sentence of section 6212(d)--added by the Technical and Miscellaneous Revenue Act of 1988 (Act), § 1015(m), 1988-3 C.B. 232--is effective for notices of deficiency issued on or after January 1, 1986. The Senate Committee Report accompanying the Act explains the last sentence of section 6212(d) as follows:

The bill clarifies that rescission of a statutory notice of deficiency does not affect any suspension of the running of any period of limitations during any period during which the rescinded notice was outstanding. For example, assume that six months remain to run on the statute of limitations with respect to a return when the IRS issues a statutory notice of deficiency. Issuance of this notice suspends the statute of limitations. If the IRS and the taxpayer agree to rescind the statutory notice, then as of the date the notice is rescinded, the statute of limitations again begins to run and (in this example) six months remains until the statute expires.³

See also H.R. Rep. No. 795, 100th Cong., 2d Sess., pp. 364 (1988).

Revenue Procedure 98-54, 1998-43 I.R.B. 7, provides taxpayers with instructions for entering into an agreement with the Internal Revenue Service to rescind a notice of deficiency under section 6212(d). Revenue Procedure 98-54 clarified, modified, and superseded Rev. Proc. 88-17, 1988-1 C.B. 692.

Section 4.05 of Rev. Proc. 98-54 provides in part that the Service will not rescind a notice of deficiency under the following circumstances:

(1) On the date of the rescission, 90 days or less would remain before the expiration date of the period of limitations on assessment. However, a notice of deficiency may be rescinded in these circumstances if, before the

The additional 60 day suspension provided for under section 6503(a)(1) is not added to the period of limitations in this example, six months. It is not clear whether this was an oversight or whether the Congress intended that the additional 60 day suspension period was not to apply when a notice is rescinded.

rescission, the taxpayer and the Service execute a consent to extend the period of limitations on Form 872 or Form 872-A;

(2) The 90-day or 150-day restriction period under § 6213(a) has expired without the taxpayer filing a petition with the Tax Court;

Section 5.03 of Rev. Proc. 98-54 provides that the "effective date of the rescission agreement is the date on which the Commissioner's delegate signs Form 8626."

II. Analysis.

The taxpayers timely filed joint returns for the [REDACTED] and [REDACTED] taxable years on or before April 15, [REDACTED] and April 15, [REDACTED], respectively. Accordingly, the assessment period for the [REDACTED] year was originally set to expire on [REDACTED] and the assessment period for the [REDACTED] year was originally set to expire on [REDACTED]. § 6501(a) and (b).

Prior to expiration of the original assessment date of [REDACTED], in [REDACTED] of [REDACTED] the taxpayers and a delegate of the Commissioner executed a Form 872 and extended the period of assessment for the [REDACTED] taxable year to [REDACTED]. § 6501(c)(4). A Form 872 was not executed with respect to the [REDACTED] taxable year prior to [REDACTED], and it remained set to expire on that date. § 6501(a).

On [REDACTED], the taxpayers were timely issued a notice of deficiency for the [REDACTED] and [REDACTED] taxable years. At that time, there were ten (10) days remaining on the assessment period with respect to the [REDACTED] taxable year (April 15, [REDACTED], and 270 days remaining on the assessment period with respect to the [REDACTED] taxable year ([REDACTED]).⁵

The 90 day period for filing a petition with the Tax Court expired on [REDACTED]. Specifically, the [REDACTED] day after [REDACTED] was [REDACTED], a [REDACTED] and a national holiday.

Section 3.05(1) of Rev. Proc. 88-17 provided, in part, that the Service would not rescind a notice of deficiency if, on the date of rescission, the period of limitations on assessment would have expired but for the issuance of the notice of deficiency. Section 3.01 of Rev. Proc. 98-54 deleted this provision as a result of the 1988 amendment to § 6212(d).

[REDACTED] is ten (10) days after [REDACTED] and [REDACTED] is 270 days after [REDACTED].

Because [REDACTED] was a Sunday, the following Monday was the legal holiday in the District of Columbia. Consequently, the last day for filing a petition with the Tax Court was Tuesday, [REDACTED]. § 7503; T.C. Rule 25(a)(2).

The taxpayers did not file a petition with the Tax Court. Instead, on [REDACTED], they executed a Form 872 for both years, as well as a Form 8626 for the notice of deficiency. Copies of both executed forms were faxed to the Service that same day. The Form 872 extended the assessment periods for both of the years [REDACTED] and [REDACTED] to [REDACTED]. The Service received the signed originals of both forms by mail on [REDACTED].

On [REDACTED], a delegate of the Commissioner signed both the Form 872 and the Form 8626. The effective date of both forms was therefore [REDACTED], one day after the last day for filing a petition with the Tax Court.⁵ Treas. Reg. § 301.6501(c)(1)(d); Rev. Proc. 93-54.

Execution of the Form 8626 on [REDACTED] was inconsistent with section 4.05(2) of Rev. Proc. 98-54, since the 90 day restriction period under section 6213(a) had expired without the taxpayers filing a petition with the Tax Court. However, the rescission of the notice of deficiency under these circumstances was valid and effective under section 6212(d).

Section 6212(d) expressly provides that the "Secretary may, with the consent of the taxpayer, rescind any notice of deficiency mailed to the taxpayer." (Emphasis added). The statute does not qualify or limit the type of notice of deficiency that the Secretary may rescind (other than by the obvious prerequisite that it must have been mailed to the taxpayer (i.e., issued)). "Any" notice of deficiency necessarily includes a notice of deficiency mailed to a taxpayer who chooses, for whatever reason, not to file a petition in the Tax Court.

Accordingly, rescission of the notice of deficiency under the instant circumstances is authorized and valid under section 6212(d).⁷ Moreover, even if the rescission was invalid, the

The letter to the taxpayers from the 90 Day Section dated [REDACTED], stated that "the notice of deficiency was rescinded on [REDACTED]." However, pursuant to section 5.03 of Rev. Proc. 93-54, the effective date of the rescission was [REDACTED].

Although the rescission of the notice was inconsistent with section 4.05(2) of Rev. Proc. 98-54, it was arguably

Service is not precluded from issuing a second notice of deficiency to the taxpayers for the years at issue, since they did not file a petition with the Tax Court within 90 days of the issuance of the first notice." See Brown v. Commissioner, T.C. Memo. 1996-325.

Finally, as for the respective periods on assessment, the Form 872 for both years was timely executed, and therefore it extends the assessment periods for both years until [REDACTED].

Pursuant to the last sentence of section 6212(d), rescission of the notice of deficiency did not affect the suspension of the assessment periods for the time during which the notice was outstanding. Here, the rescission was effective on [REDACTED] one day after expiration of the 90 day suspension period triggered by the notice. Therefore, whether the rescission was valid or not, the notice of deficiency operated to suspend the limitations periods for 90 days (or until the last day the taxpayers could file a petition, [REDACTED]). §§ 6503(a)(1), 6213(a), 6212(d).

The Form 872 for both years was fully executed and effective on [REDACTED], which date was well prior to expiration of the 10 days remaining to assess [REDACTED], as well as the 270 days remaining to assess [REDACTED], not taking into consideration the additional 60 days provided by section 6213(a). Accordingly, the Form 872 will operate to extend the assessment periods for both years until the date agreed upon, [REDACTED]. I.R.C. §

authorized under section 4.05(1) of Rev. Proc. 98-54. Moreover, procedural rules, such as those set forth in Revenue Procedure 98-54, are merely directory, not mandatory. Collins v. Commissioner, 61 T.C. 693 (1974); Cataldo v. Commissioner, 60 T.C. 522, 523 (1973).

The statutory restriction on further deficiency letters is triggered only "If the Secretary has mailed to the taxpayer a notice of deficiency * * * and the taxpayer files a petition with the Tax Court * * *." (Emphasis added). § 6212(c).

The validity of the Form 872 is critical here. Assuming that rescission of the notice of deficiency was invalid, then the time within which to assess the [REDACTED] deficiency expired on [REDACTED] (150 days from [REDACTED] is [REDACTED], and ten days after [REDACTED] is [REDACTED]). For the [REDACTED] year, due to the previous Form 872, the Secretary would have until [REDACTED] to assess. (270 days after [REDACTED] is [REDACTED]).

6501(c)(4).

CONCLUSION

The Service may re-issue the previously rescinded, non-petitioned notice of deficiency. Also, pursuant to the Form 872 for both years, the respective assessment periods have been extended to [REDACTED].

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APPROVED:

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